

No. 03-21-00053-CV

In the Court of Appeals for the FILED IN
Third District of Texas at Austin 3rd COURT OF APPEALS
AUSTIN, TEXAS
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Mary Louise Serafine, *Appellant*

JEFFREY D. KYLE
Clerk

v.

Karin Crump, in her individual capacity, and Lora J. Livingston, in her official capacity, as Presiding Judges of the 200th Civil District Court of Travis County, Texas; Melissa Goodwin, in her individual and official capacities as Justice of the Third Court of Appeals at Austin, Texas; David Puryear and Bob Pemberton, in their personal and individual capacities, including as former justices of the Third Court of Appeals at Austin, Texas; and Thomas Baker and Gisela Triana, in their official capacities as Justices of the Third Court of Appeals at Austin,¹

Appellees

**From the 345th Judicial District Court of Travis County, Texas,
Hon. Todd A. Blomerth, presiding,
Cause No. D-1-GN-19-002601**

APPELLANT'S REPLY TO APPELLEE JUDGE CRUMP'S BRIEF

John W. Vinson
State Bar No. 20590010
Counsel of Record
John W. Vinson, PLLC
PO Box 301678, Austin, Texas 78703
Tel: (512) 926-7380
Email: johnvinsonatty@yahoo.com

Mary Louise Serafine
State Bar No. 24048301
Mary Louise Serafine,
Attorney & Counselor at Law
P.O. Box 4342, Austin, Texas 78765
Tel: (512) 220-5452
Email: serafine@mlserafine.com

Attorneys for Plaintiff

ORAL ARGUMENT REQUESTED

¹ The caption of this case includes Judge Livingston and Justices Baker and Triana, accurately reflecting the operation of automatic successor substitution rules in the case since 2019—Fed. R. Civ. P. 25(d) and Fed. R. App. P. 43(a), and the operation in this appeal of Tex. R. App. P. 7.2. See Tabs 4, 5, 6, Appellant's First Amended Brief.

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	3
I. Judge Crump’s brief fails to show that she met her evidentiary burden.	
II. Appellees presented no evidence to the trial court on Prong One.	
III. Judge Crump’s brief fares no better in its attempt to show that Judge Blomerth’s Prong Two ruling was supported by evidence.	
IV. Judge Crump’s specific factual statement contains false or misleading statements.	
V. Judge Crump’s brief leaves unchallenged the evidence of her fabrication of exhibits.	
VI. Judge Crump’s brief actually provides argument for why findings and conclusions are necessary.	
VII. The Court has jurisdiction over this §11.101 appeal.	
VIII. Appellant’s venue change and TCPA issues are properly before the Court.	
IX. This Court cannot remediate what Judge Crump failed to do.	
CONCLUSION & PRAYER	36

FORM OF RECORD REFERENCES

REPORTER'S RECORD & SUPPLEMENT

RR.[vol. no.]:[pg. no.]

RRSUPP:[pg. no.]

SWORN RECORD & SUPPLEMENT:

N.B.: This substitutes for a clerk's record.

SR:[pg. no.]

SRSupp1:[pg. no.]

TAB

**Bookmarked tab in
Appendix attached to
appellant's opening
brief.**

ERRATA

1. Appellant's opening brief on page 27 cites to SR:141 (sworn record), which should be RR.1:141 (reporter's record).
2. Likewise Appellant's opening brief on page 46 cites to SR:64 (sworn record), which should be RR.1:64 (reporter's record).
3. Judge Crump's *Identity of Counsel and Parties* is erroneous in showing Mary Louise Serafine as first-listed counsel, which typically indicates lead counsel or counsel of record. On the contrary, as has consistently been the case, Appellant's briefing shows Mr. Vinson as counsel of record.

TO THE HONORABLE THIRD COURT OF APPEALS:

Appellant Mary Louise Serafine replies to Appellee Judge Crump's Brief (Crump Br.).

INTRODUCTION

To declare someone a “vexatious litigant” under Chapter 11 of the Civil Practice & Remedies Code (CPRC), the statute places the burden of proof exclusively on defendants who bring the motion—here, Appellees. Appellees also have the burden in this Court to show that they met that burden before the trial court. Otherwise the Court should conclude—as is largely the case here—that Appellees are eager to show the Court that they are in the right, even though they failed to prove their case below.

Appellant alleges that Appellees brought this Chapter 11 proceeding in bad faith. They brought it to continue to evade the merits of a civil rights suit against them that showed, among other wrongs, they essentially lied in their opinions and orders about facts that took place directly before them, and then adjusted the record to comport with their fabrications. For more than three years before their hearing on whether Serafine was vexatious, these jurists deployed every conceivable tactic without success in gaining dismissal *with* prejudice. At any time they could have sought summary judgment in state or federal court, even a no-evidence summary

judgment in state court. But they knew they could not win those because much of the evidence is already contained in the petition and supplement. Their last chance, then, was Chapter 11.

Appellees' arguments here—through their counsel—essentially ask for a rewrite of Chapter 11 and an abandonment of existing precedent. When Judge Crump's appellee brief is examined, here is what, in effect, it is asking this Court to hold:

1. that by filing the Chapter 11 motion but delaying having it heard for year, the statute's seven-year period inflates to eight;
2. that the rules of evidence are not merely loosened but suspended under Section 11.053, which now supports a record that includes attorney commentary, and hearsay documents unsupported even by affidavits.
3. that *res judicata* is no longer required for a party to declare as "evidence" their own self-serving conclusions drawn from other courts' opinions; and
4. that Chapter 11 victims can be deprived of findings and conclusions, while the appellate courts continue to make every presumption in favor of the order.

There is more. The Court is also asked to hold

5. that the trial court can simply refuse to rule on a Section 11.002 claim (on

represented lawyers);

6. that the “stay” applies only to prevent accused plaintiffs from defending themselves, but does not apply to defendants; and finally,
7. that some defendants—such as Judge Crump, as detailed at App. Br. 65 et seq.²—may be permitted to fabricate evidentiary exhibits without consequence.

The Court should not adopt these holdings, even implicitly. Ultimately this case is not only about statutory construction of Chapter 11 but about whether unheard-of rules of evidence apply in adjudications under this statute.

ARGUMENT

I. Judge Crump’s brief fails to show that she met her evidentiary burden.

Appellees wholly had the evidentiary burden below. Plaintiff was not required to do or present anything. Judge Crump and Appellee Justices shared time and arguments at the hearing. As Judge Crump’s Appellee brief shows, she failed to meet her burden because she simply did not present evidence that met either Prong One or Prong Two of the statute. More specifically, she did not present evidence as Section 11.053 required. That section permits somewhat

² Appellant’s Brief is *Appellant’s First Amended Brief with Supplement*, filed 8/2/2021.

looser evidentiary standards—for examples affidavits, which are normally hearsay, qualify as evidence. But Section 11.053 does not wholly eliminate the rules of evidence or permit the judge to rule based on *no* evidence.

Judge Crump notes that the fact-finder is the sole judge of witness credibility and the testimony's weight. Crump Br. 5-6. True, but nothing permits the fact-finder to give weight to that which is *not* testimony and to treat as credible those who are not witnesses. Judge Crump had no witnesses. Appellees' lawyers merely offered their own free-floating opinions and purported "facts"; there was no need to cross-examine them because they did not testify.

It appears to Appellant that Defendant-appellees assumed very little was required of them, and they need not comply with the statute, the rules of evidence, or precedent that applies to Chapter 11; they believed they would be successful anyway, here and below.

The only sworn testimony in this matter was that of Serafine at the hearing on 12/30/2020. RR1:57 (Serafine sworn). To get the evidence they needed, defense counsel should have deposed Serafine or cross-examined her after she testified under oath at the hearing. The judge offered cross-examination, but they declined:

MS. CORBELLO: No questions from me, Your Honor.

THE COURT: Mr. Nelson?

MR. NELSON: No questions at this time, Your Honor.

RR.1:114.

The judge asked defense counsel again, “Does anybody have any questions on those issues?” Again all defense counsel declined. RR.1:121.

The judge offered a third time, and defense counsel again refused.

RR.1:132.

Appellee Judge Crump appears to expect that this Court will ratify her steadfast refusal to develop her own real evidence.

What defense counsel should have asked. Defense counsel should have asked Serafine to testify to the documents they proffered to show that they met the 11.054(1)(A) criteria. And they could examine Plaintiff to show her own documents did not meet the criteria, her allegations in the petition were baseless, thus Prong One was met, etc. Or other witnesses could have conducted the

analyses in the petition and testified to that point.³

Defense counsel could have asked Serafine to describe the substance and context of each filing on their list, potentially to prove the matters were “finally determined adversely,” were “final judgments” not later reformed or reversed on appeal, and met other criteria. Or someone else could have testified after studying the files. Or they could have attacked Serafine’s credibility.

Instead, defense counsel eschewed producing evidence to the trial court, apparently on the uncertainty there was any. There is not merely the absence of evidence here. There is a dogged refusal to adduce any.

Although certain documents that had been attached to Judge Crump’s motion were authenticated, it is not clear all of them, especially J through M, were admitted. RR.1:47-50. Serafine made objections, which were overruled. Even if Appellees’ documents were evidence, it is unclear what they were evidence of. ***If any documents had met the criteria, the trial court should have received evidence that the substance and context of each document rendered it in conformity with Section 11.054(1)(A).***

³ On the veracity of the petition’s allegations: The petition so clearly cites the record evidence and computer analyses of the Jurists’ falsified opinions and orders that anyone, if they had the record filed in this Court, could test the allegations to determine their validity.

Courts should reverse a vexatious litigant order if defendant-appellee cannot show that the substance of a claim was presented to the trial court; if its substance was not presented, the trial court had no reason to determine that the claim met the criteria. *Walp v. Williams*, 330 S.W.3d 404, 407 (Tex. App.—Fort Worth 2010) (Dauphinot, J., concurring). In *Walp*, the court concluded that it “cannot consider” a particular piece of evidence “***because [it] was not produced in the trial court.***” *Ibid.* (emphasis added). As a result, the trial court could not have determined whether its substance met the criteria (that is, was final, *pro se*, adversely determined, in the past seven years, etc.). Nevertheless the trial court—with only four instead of five qualifying cases—designated the plaintiff vexatious. *Walp* reversed the trial court, therefore.

The instant case is similar because Judge Blomerth had no reason to determine that any of Defendant-appellees’ documents were evidence of a qualifying case.

On the other hand, Serafine’s testimony, admitted exhibits, and filed opposition to Defendant-appellees motions had shown that each document except one ***did not meet the criteria.*** See App. Br. 54 (chart of documents).

Defendant-appellees simply produced no evidence that any of their documents met the 11.054(1)(A) criteria. Under oath, RR.1:57, Serafine testified

for more than two hours, RR.1:64-132, showing that Defendants’ eight documents did not qualify as “litigations” that met the criteria. By contrast, Appellees had no witnesses, no testimony, no evidence of the substance and context of any document.

Serafine began by testifying that there were only three cases, not five, much less eight. RR.1:65 et seq. (“[B]y color-coding them blue, red, and black, there are really only three cases here.”)

Serafine’s testimony continued with admission of Plaintiff’s Exhibits 1 to 33, some 240 pages. RR.2:9-250. Serafine’s unchallenged testimony and exhibits overwhelmingly showed that, to the contrary, Defendant-Appellees’ documents did not meet the criteria..

Even the 2020 documents that Appellees erroneously proffered long after the motion was filed—the Fifth Circuit dismissal of appeal and Supreme Court denial of certiorari—are plainly the same case. Indeed, all the trial court had was Ms. Corbello’s free-floating opinions about “what the Fifth Circuit said,” as she thought it relevant, without explanation. This is not evidence. Counsel said, “What the Fifth Circuit said there is that Ms. Serafine alleged many and varied violations. Her allegations do not establish Article III standing. Specifically what the Court hinged on was her inability to show any future likelihood of a substantial

harm from the Defendant Justices or Judge Crump herself.” RR.1:17-18.

Mr. Nelson later opined, “The appeal was dismissed, again as I’ve stated to the Court earlier, based on Article III standing.” RR.1:38.

Nothing before Judge Blomerth established that dismissing the federal appeal had anything to do with Prong One of Chapter 11. Nor is “Article III standing”—the federal doctrine that assures separation of powers—relevant to either Prong of Chapter 11. But even if it were, Ms. Corbello’s and Mr. Nelson’s off-hand remarks are not factual testimony, expert testimony, or any other form of evidence.

In sum, Judge Crump’s Appellee brief fails to justify or repair that she presented no evidence in the court below.

II. Appellees presented no evidence to the trial court on Prong One; Judge Crump’s erroneous briefing today—never presented to the trial court—that Article III standing applies in Texas and is a “legal issue” requiring no facts—cannot rescue Prong One.

As an initial matter, the entirety of Appellees’ success on Prong One hinges on this Court’s favoring them with a decision that “seven years” means “eight years.” *See App. Br. 57-59.* Appellees need this abracadabra because their only hope of defending Prong One after the fact is to have the Court rely on the Fifth

Circuit's findings, without *res judicata* having been moved.

The question is not really whether seven means eight, however. The statute actually refers to *seven years before filing of the motion*. Under no canon of construction can “seven years before” mean “*seven years before plus one year after*.”

Judge Crump's brief proffers two reasons, however, why the Court should venture out to this distant planet. Crump Br. 29-30. First, she points to the fact that Section 11.053 permits the trial court to accept “any evidence.” She posits that this somehow repeals “seven years before filing of the motion” because under 11.053, the trial court can take any evidence it wishes. Crump Br. 29. This seems, on its face, to be legal nonsense.

Second, Judge Crump claims that the phrases in Section 11.054(1) specifying that plaintiff “commenced, prosecuted or maintained” legal actions “in the seven-year period immediately preceding...the motion,” is intended to operate alone, independent from subsections A, B, and C. This reading nullifies subsections A, B, and C. They are removed from the seven-year analysis so that what they now mean is (A) that plaintiff's case was “finally determined adversely” some time during the remainder of plaintiff's life; (B) that a case started during the seven years remained “pending” much later, at any time; and (C) that a case started

during the seven years was determined “frivolous” at some point during the remainder of plaintiff’s life. In short, this interpretation simply has no closing off point. Under this interpretation, if a plaintiff is ***not*** found vexatious, the matter could presumably be re-opened years later, when new events after the motion make it opportune to re-open. Judge Crump’s interpretation rips the cover off Pandora’s Box.

The Court should not re-write the statute or lay down this gloss. It was abuse of discretion to admit Exhibits I, J, K, L, and M because it was far outside any well-known canons of construction, not counting the burden on Plaintiff’s counsel of throwing these into the proceeding less than 24 hours before it began.

Further to Prong One, Appellant makes these points:

Judge Crump relies almost exclusively for Prong One on what she says is an Article III standing decision from the Fifth Circuit, that applies to this Texas case now. She claims this establishes Prong One because Serafine can’t succeed without standing. There are two problems here. First, the Fifth Circuit held only, “For the foregoing reasons, the ***appeal*** is DISMISSED.” RR.2:370 (decision) (emphasis added). Dismissal of an appeal is not the same thing as dismissal of an entire case. And the question before the trial court was not whether Serafine could establish jurisdiction (standing is jurisdictional) for a federal appeal; the question

was whether Serafine has standing to bring this case. Nowhere does Judge Crump, or any Appellee, discuss even one of Serafine's substantive allegations, the time period when they occurred, what harm is alleged, and so forth.

Appellees should have established these facts by deposing or examining Serafine—or even Defendants themselves—at the hearing. Instead, apparently assuming they would be successful without doing so, they doggedly refused to develop evidence.

Second, Article III standing under the federal constitution simply does not apply to state courts. The Justices' counsel (speaking for all appellees) opened Appellees' portion of the hearing with the irrelevant statement, "[Serafine's petition's] allegations do not establish Article III standing." RR.1:18. This is nonsensical. Serafine had no need to establish Article III standing because we are not in federal court. Nowhere does Appellees' counsel justify or explain to the trial judge why he should adjudicate Article III. The Justices' counsel continues to invite error in comments that were adopted by Judge Crump: "The Fifth Circuit...saw that briefing, heard that argument, and still found Article III standing did not exist, and in doing so, this Court should hold the same." RR.1:18. No evidence whatsoever supports this misleading, off-hand opinion. This again demonstrates what is wrong with substituting off-hand counsel commentary for

actual evidence. For example counsel advanced that there was “briefing” that led to the Fifth Circuit’s standing holding. But there was no such briefing. The specifics of the Fifth Circuit’s holding were *sua sponte*, its facts nowhere in the record, and on the face of the Fifth Circuit’s opinion ***only the appeal was dismissed, not the whole case.***

This is worth repeating: The Fifth Circuit did not dismiss for lack of standing Serafine’s federal complaint that made the same allegations as here. It dismissed only the appeal immediately before them.

Texas may of course adopt standing doctrine similar to federal doctrine, as it has. *See Heckman*, 369 S.W.3d 137, 154 (Tex. 20212) (relying on *Allen v. Wright*, 468 U.S. 737, 751 (1984) deciding that Texas “parallels” federal Article III standing). But this is far different from what Appellees represented to the trial court—that Article III standing was already decided ***under Serafine’s allegations in this case***, that Serafine lacked Article III standing, and that the Fifth Circuit effectively decided Prong One then and there. None of this is correct.

At a minimum Appellees presented conflicting evidence because they conceded, “The ***appeal*** was dismissed...based on Article III standing.” RR.2:38 (emphasis added). But they erroneously continued to equate standing to bring a federal appeal with standing to bring this state case.

It is important to understand that the Fifth Circuit declined to adopt the much simpler “standing” arguments that the parties had briefed there—just as the federal district court had declined them. (Indeed Serafine showed she met all the requirements of *Heckman*.) ***Those other arguments are the same ones Appellees put in their vexatiousness motions***, which today—at this late date—they have transformed into something wholly different in an attempt to sweep it into the Fifth Circuit’s opinion.

Also, Judge Crump’s brief does not address—but leaves intact and unchallenged—Serafine’s Appellant’s brief’s point that the Fifth Circuit’s opinion was never subjected to *res judicata* in the trial court, or even collateral estoppel. App. Br. 28. In addition, courts may not simply adopt the facts and holdings of other courts, particularly where the facts and issues are not the same (e.g., standing to bring appeal, as opposed to standing in another jurisdiction to bring a case). App. Br. 28.

Leaving these arguments unchallenged, Judge Crump does no more than give them the conclusory label “without merit” and fail to address Serafine’s cited case law. Crump Br. n. 37. The brief then wrongly proffers that standing is “a question of law.” Crump Br. n. 37.

Crump’s brief cites no authority for this proposition; we know of none.

Clearly the Texas Supreme Court's *Heckman* decision, *supra*, spends page after page discussing the extent to which the named plaintiffs have civil rights claims remaining, whether the class plaintiffs do, whether differences among plaintiffs' alleged crimes matters, and other facts.

Standing—which depends, among other things, on whether the complaint is traceable to the named defendants, whether the harm alleged could be redressed by the relief claimed—are highly fact-intensive inquiries.

The Court should not hold, as Judge Crump suggests, that standing is “a question of law.”

In the longest section of her brief, Crump Br. 14-26, Judge Crump spends some 14 pages and nearly 3600 words explaining Article III standing with the intent that “Appellee Jurists will show the trial court did not abuse its discretion....” in “finding” Prong One was met (and later Prong Two). Crump Br. 14.

But that is not their task. Their task is not to show evidence and argument to this Court—which cannot adjudge facts and take evidence or argument not presented below. Their task is to show that they made the evidence known to the trial court. If they could show that, it would portray that the judge based his ruling on evidence, as he must.

For many reasons, Appellees' presentation here in this Court of facts and

theories not presented below tends to show, to the contrary, that the trial judge ruled without evidence. No standard of review or sufficiency theory cures this.

Judge Crump relies on and invites two additional errors. First, she wrongly cites attachments to her filings as purported evidence. Crump Br. 16. But attachments are not evidence. *Happy Jack Ranch, Inc. v. HH&L Development, Inc.*, No. 03-12-00558-CV *n. 7 (Tex. App.—Austin Nov. 6, 2015).

Even if we assume the documents were admitted as evidence—including some at the hearing—nothing cures that the trial judge received no evidence that these met §11.054 criteria. Nowhere—not in their motions or at the hearing—did Appellees explain why these documents met any criteria, much less met the multiple separate criteria necessary.

This is like admitting medical records as “evidence” and then merely proclaiming them to show medical malpractice.

What Appellee-Jurists are requesting is that the Court ratify a radical change in our system of evidence. Why didn’t Appellees adduce the evidence they needed?

Here, the trial judge did not know what any of Appellees’ documents were; he could not possibly have had reason to believe they should be counted.

Judge Crump’s brief claims that lack of Article III standing was “argued

extensively” at the hearing, at transcript pages RR.1:18-19, 38, 56, 141- 142.

Crump Br. 16, n. 30. Except for some of counsel’s comments at 18-19, we do not find the these pages to “extensively” concern Article III standing.

We find other citations in Judge Crump’s motion to be exaggerated or inapposite. For example, her motion, SR:218-358,—far from extensively briefing Article III standing in the manner presented here on appeal—consumed only about 15 pages and covered multiple legal theories, not just standing. These included failure to meet Section 1983's requirements and continuing harm;⁴ judicial immunity, sovereign immunity, and mootness. SR:221-236. Each of these theories depends on distinct facts.

Likewise other citations in Judge Crump’s brief do not properly or directly stand for the propositions for which they are cited. The Court would err to adopt Judge Crump’s premises, because little if anything in the record supports them. Moreover, Appellees presented at the hearing only their counsel’s unsworn remarks; we re-emphasize in the margin that counsel’s off-hand comments cannot

⁴ Appellant maintains that the *Blunt* remand proceeding now before this Court showed clearly that due process protection was absolutely necessary. As Appellant briefed in that case, Judge Livingston, as the successor substitute Judge Crump, denied Serafine due process and protected Alexander Blunt’s admitted, material false testimony, recanted completely after sustaining it for three years. The judge omitted this entirely from her FFCL.

substitute for evidence.⁵

Next, Crump's brief presents a new argument under Leonard, never presented below, and without facts. On pages 14 and 15 of her brief Judge Crump doubles down on her system. She now proposes that *Leonard* provides the paradigm for Appellees' proof of Prong One. In effect, Judge Crump wants *Leonard* to stand for the proposition that the age-old definition of *dismissal without prejudice* is reformed. Instead of meaning without prejudice to *refiling*, Appellees want dismissal without prejudice to mean dismissal *with prejudice*, on the merits.

Again Appellees propose that the Court radicalize itself and invent new law. *Leonard* in any event is distinguishable and Appellee does no more than pull favorable descriptions out of the *Leonard* case, without showing that *Leonard* is similar to this case.

At pages 16 and 17 Judge Crump's brief quotes Judge Blomerth making off-hand comments, where he again reaches conclusions without evidence. Serafine's petition and supplement amply set forth that the degree of collaboration and joint decision-making among Travis judges is rife. Serafine quotes a bench/bar conference and transcript of a CLE program to show this is not idle allegation. In

⁵ Ms. Corbello in at least twice refers to the Blunts as Serafine's "neighbors." RR.1:19, 139. She has no direct knowledge about this. In reality, the Blunts have not been "neighbors" of Serafine for nearly eight years.

federal court Serafine issued a subpoena to get further evidence, which the federal court stayed by order within only hours of its issuance. Judge Blomerth should have announced he would not take evidence on the point instead of making a finding without evidence. Judge Crump's quotation does not quote Serafine response thereafter. In any event, Judge Crump is apparently hoping to impair Serafine's credibility with the Court by mentioning this irrelevant material. In reality, it shows that no evidence in the trial court demonstrated Prong One.

Judge Crump calls for a radical holding from this Court. Pages 20 to 26 of Judge Crump's brief are a long section on standing.

This material was largely not presented to the trial court. We repeat that *all* of the Fifth Circuit's purported findings were *sua sponte*. Appellees' inclusion of Serafine's briefing would show this. The findings also remain highly disputed; a close reading shows that all of its specific facts about Travis County judges are wrong. As Appellant's Brief showed, courts may not adopt the findings of other courts. The reason is that such findings are nearly always disputed, their evidence is unknown (which, in the Fifth Circuit's case was none), and adoption across courts increases the risk of bad findings being replicated. *See App. Br. 28-29.*

Nevertheless Judge Crump's brief selectively extracts those portions she thinks pertain to Serafine in the instant case. They do not. There was simply no

evidence presented in that court and there are no facts in the record to support the Fifth Circuit's purported findings.

Astonishingly, Judge Crump—after presenting purported “evidence” only to this Court—then wants that evidence to be weighed against the legal sufficiency “scintilla” standard. Crump Br. 26. The Court should decline the invitation to error. It would amount to the Court boot-strapping a result by receiving purported “evidence” not only impermissibly from another court and jurisdiction, but without *res judicata* protection.

Finally, Judge Crump's brief continues to present this Court with false factual statements, unsupported by citations. Judge Blomerth made a “pronouncement” she avers, that his ultimate “ruling” was “based upon” “lack of standing” with a “focus” on federal “Article III.” Crump Br. 26, n. 38. There is no citation for this exaggerated, self-serving assertion. We do not find the “pronouncement.”

Likewise, Judge Crump claims “sovereign immunity” without citation that the same actually reached the judge. *Ibid.* Equally important, no evidence was adduced at any time that goes to sovereign immunity and whether the *Ex parte Young* exception applied.

III. Judge Crump’s brief fares no better in its attempt to show that Judge Blomerth’s Prong Two ruling was supported by evidence, regardless of evidence and argument she attempts now to proffer in this Court.

As an initial matter, we do not find in the transcript that Exhibits J, K, L, and M are described in a way that makes them relevant.

Again in her brief Judge Crump submits purported “evidence” and argument here, without showing it was presented below. Crump Br. 26-36.

As an initial matter, Judge Crump fails to address Appellant’s brief’s evidence and argument (at the hearing and in her brief), showing that the correct definition of “pro se” is *without the benefit of a lawyer*. App. Br. 32. Judge Crump fails to address Appellant’s briefing on this issue, leaving it intact and unchallenged. For that reason the Court should adopt Serafine’s position, but also that position comports with authority instead of counsel’s informal, un-examined assumption that Serafine’s signing a paper means the entire case was *without the benefit of a lawyer*. Appellees did nothing at the hearing to challenge Serafine’s argument and testimony on this, again preferring to rely on self-serving assertions.

Similarly Appellees also assume that unless a decision is wholly successful—an unlikely occurrence when plaintiffs’ lawyers correctly plead—it counts as an “adverse determination” even if it is not on the merits. No one

considers a denial of certiorari , or a petition for review, or a petition for rehearing to be a merits decision. But Appellees do.

Again Judge Crump's briefing intended to show that Appellees met Prong Two has two problems: It fails to address the points in Appellant's brief; and it fails to show that evidence explaining their exhibits was presented to the trial court.

IV. Judge Crump's specific factual statement contains false or misleading statements; it otherwise leaves Appellant's factual statements intact.

Judge Crump's brief does not challenge Appellant's statement of facts and other factual statements throughout Appellant's brief, leaving them intact before this Court.

Judge Crump's brief in its factual section proffers several unsupported, misleading factual statements that require correction.

First, Judge Crump alleges that this is "[Serafine's] second suit against Appellee Judge Crump and the Appellee Justices...." Crump Br. 1. There is no evidence for this, only an irrelevant citation to the first page of Serafine's petition. But this is not a "second suit." If it were it would be past its statute of limitations, which this identical suit avoids by coming under the Texas "savings statute," as the petition sets out.

This case is identical to the suit filed in federal court that was dismissed

without prejudice to refiling. See App. Br. 27. Appellees leave this point in Appellant’s brief intact, unchallenged. Nowhere do they show that a dismissal that allows refiling is “adverse.” This is important because the “second suit” idea was intended to support Appellees’ erroneous double-counting.

This is the general problem with Judge Crump’s brief as with the Justices’. They simply did not meet their evidentiary burden in the trial court.

Third, equally without evidence is Crump’s statement, “Each one of these adverse decisions against Appellant were rendered upon a *pro se* filing made by Appellant herself.” Crump Br. 2. But again there is no evidence for this. The brief cites four pages of the hearing transcript (RR.1:34-37), where Crump’s counsel presented documents purporting to claim that Serafine signed them, but without showing that they were *pro se*. Appellant’s brief explains—and Judge Crump does not challenge—that *pro se* means without a lawyer. App. Br. 32.

Judge Crump’s brief also falsely represents that the trial court “found” Appellant vexatious “[b]ased on these adversely-decided litigations, as well as the probability of a lack of success on the merits....” The brief then cites to the trial court’s orders for prefilings and security. Crump Br. 2. Absolutely nothing supports this statement. Nowhere does the judge state “findings” or the basis for them; indeed all Appellees vehemently fought to prevent findings of fact and

conclusions of law. Although Judge Crump elsewhere claims that Judge Blomerth made “findings” at the end of the hearing, Crump Br. 13, none of the statements she lists are *findings of fact* or *conclusions of law*. They are oral rulings, nothing more.

The Crump brief also alleges a “9+ year saga of the series of cases that have arisen out of what began a property line dispute....” Crump Br. 4. This statement is false, baseless, and evinces contact likely with the Blunts’ lawyer, Amanda Taylor, who promulgates this. We do not pursue this further here because it is unnecessary. *But see also* Appellant’s Reply to Justices, p. 21.

Finally, Judge Crump’s brief indulges in her characteristically improper *ad hominem* speculation that Appellant “cannot accept” some notion or other. Crump Br. 4. In reality, what Appellant finds unacceptable is the level of judicial and official malfeasance that formed the basis of this suit, as the petition and supplement set forth.

V. Judge Crump’s brief leaves unchallenged the evidence of her fabrication of exhibits set forth below and in Appellant’s brief.

Appellant’s opening brief sets forth the raft of fabricated evidence—and the analysis that shows it is fabricated—that was presented to the trial court. *See* App. Br. 65 et seq. Serafine filed objections to the fabricated exhibits and a verified

motion to strike them, a full month before the hearing. CR:617-630. At the hearing, Judge Blomerth appeared not to have read the motion and was unfamiliar with the topic; he summarily overruled objections to the fabrications, RR.1:49-50, later providing a written order denying the motion to strike.

Judge Crump's appellee brief does not challenge Appellant's brief's showing of the fabrication, but leaves it intact.

The trial judge's rejection of the judicial duty to protect the court's integrity—and the soiled record containing fabricated evidence—indicates that this proceeding did not meet fundamental fairness.

VI. Judge Crump's brief actually provides argument for why findings and conclusions are necessary.

At pages 11 to 13, Judge Crump's brief disputes Appellant's position that the Court should abate the appeal so that the trial judge can enter findings of fact and conclusions of law (FFCL).

Judge Crump earlier opened the topic by noting that Section 11.053 permits “[a] court [to] consider any evidence material to the ground of the motion....” Crump Br. 6. Three times that section refers to “evidence.” Nothing about it opens the door to rulings without evidence, as occurred in the instant case. Despite the unusual posture in which the parties and the trial court are placed by Chapter

11—the victim is “stayed” from defending himself, all other Texas law is temporarily suspended, there are no findings of facts and conclusions of law—the Crump brief encourages the Court to maintain the same strictures that would apply in normal proceedings; that is, that the appellate court presumes affirmance unless plaintiff attacks all possible grounds, including ones never raised; that a scintilla of evidence defeats a legal sufficiency challenge; and that it takes overwhelming evidence to defeat factual sufficiency. With all that, the standard of review is discretion. The deck is stacked against the plaintiff and in favor of finding and affirming vexatiousness. This defeats a genuine appeal.

Against this backdrop, Serafine urges that the case should be remanded or abated for entry of findings of fact and conclusions of law (FFCL). App. Br. 16-17. Crump’s main ground for opposing this is *Beasley v. Soc’y of Info. Mgmt.*, *Dallas Area Chapter*, No. 05-19-000607-CV (Tex. App.—Dallas Aug. 28, 2020). Her reasoning appears to be, in effect, that although Section 11.054(1)(A) requires decision-making on multiple factors, they all boil down to a single “ground” for the vexatiousness finding, because it is contained in one subsection.

But it is just not so. Under that section, the trial court (1) specifies the seven-year period; (2) finds that actions were maintained; and (3) locates five that were *each* (4) *pro se* and (5) finally determined and (6) adversely determined.

This is at least 25 different determinations (five determinations five times) from likely a longer list of potential candidates. Judge Crump advances that 25 or more determinations is somehow “one ground” because it is under one statutory subsection. This defies logic. To the extent *Beasley* advanced this, it is wrongly decided and the Court should not follow it. Judge Crump’s original motion to declare Plaintiff vexatious identified eight “orders” that she and the Justices said were countable. A year later these inflated to ten or twelve and now, another year later on appeal they have, by themselves, transmogrified into “litigations”—which Appellant roundly disputes.

It requires major “guessing” to determine how all this occurred.

Judge Crump’s brief purports to summarize what she considers the trial court’s findings, based on the judge’s oral comments at the hearing. Crump Br. 13. She lists seven purported findings without quoting the transcript. In reality, the judge’s words are not as clear as Crump’s brief represents. And virtually all of the determinations a court must make under Prong Two do not appear.

More importantly Crump’s brief wholly ignores the law set out in Appellant’s brief—that under *Larry F. Smith* oral statements and court orders do not count as FFCL App. Br. 16. Failing even to mention this, Judge Crump leaves Appellant’s conclusions intact and unchallenged.

Judge Crump has not defeated the requirement for FFCL.

VII. The Court has jurisdiction over this §11.101 appeal.

Judge Crump’s brief makes a weak challenge to the Court’s jurisdiction.

Crump Br. 7. Because we recognize that a court can evaluate its own jurisdiction at any time, we address the topic.

A. Chapter 11 provides for limited interlocutory appeal.

As courts have pointed out,⁶ Chapter 11 of the Civil Practice & Remedies Code (CPRC) provides two different methods for penalizing what the statute deems a “vexatious litigant.” The first method is under Section 11.051. It allows a court to “determin[e] that the plaintiff is a vexatious litigant and requir[e] the plaintiff to furnish security.” CPRC §11.051. Importantly, this section, using the word “and,” requires both determinations—if security is required, then the plaintiff must also be declared a vexatious litigant.

The second method is under Section 11.101, where a court may “enter an order prohibiting a person from filing, *pro se*, a new litigation [without permission]” —called the “pre-filing” or “pre-clearance” order—but only “if the court finds...that the person is a vexatious litigant.” CPRC §11.101(a). Again this

⁶ As one example, see *Florence v. K. Rollings*, No. 02-17-00313-CV (Tex. App.—Fort Worth Aug. 30, 2018) (mem. op.)

method requires both determinations.

As to the second method, the statute provides, “A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.” CPRC §11.101(c), “Several courts have interpreted [this] as providing for an interlocutory appeal,” *Florence v. K. Rollings*, No. 02-17-00313-CV (Tex. App.—Fort Worth Aug. 30, 2018) (mem. op.).

This means that, to appeal the pre-filing or pre-clearance order, an appellant plainly needs to dispute the validity of the vexatious litigant designation. The section itself refers to a “prefiling order ***entered under Subsection (a) designating the person a vexatious litigant.***” Section 11.101(c) (emphasis added). For example, the Fort Worth court, after concluding “we have jurisdiction over [appellant’s] appeal from the prefiling order...” then turns to an extended analysis of “The Trial Court’s Vexatious-Litigant Finding.” *Florence*, No. 2-17-00313-CV, *supra*.

Notably, the *Florence* court analyzes the “Vexatious-Litigant Finding” even though, as here, appellant “has not furnished the ordered security....[and] the trial court has not dismissed [appellant’s] claims.” *Ibid*. In other words the absence of dismissal and signed judgment did not prevent the appellate court from reviewing the vexatiousness finding.

Similarly the opinion in *Walp* “review[s] the trial court's finding” that appellant was a vexatious litigant. *Walp v. Williams*, 330 S.W.3d 404, 407 (Tex. App.—Fort Worth 2010) (Dauphinot, J., concurring). *Walp* is important because in addition to finding “that the trial court abused its discretion by finding Walp a vexatious litigant and dismissing his claim...,” *id.*, “***the trial court also abused its discretion by ordering Walp to post the security....***” *Ibid.* (emphasis added).

The appellate court therefore “reverse[d] the trial court's order finding Walp a vexatious litigant and dismissing his claim ***for failure to post security....***” *Id.* (emphasis added). In effect, the *Walp* court actually did reach and reverse the requirement of security.

There could be no other result. It could never be the case that—after a judge abuses discretion by finding a condition precedent to a punishment—that the punishment remains although the ruling was wrong.

There are few other precedents because appellate reversals of vexatious litigant findings are rare; but this is the correct result.

B. *This is a §11.101(c) appeal that includes the vexatiousness finding.*

Judge Crump’s brief cites no passage in Appellant’s brief—and there isn’t one—where Appellant asks the Court to find that \$5,000 is too much money, that the judge unfairly assessed it, that the time allowed to produce it was too short, or

some other error surrounding the security. Instead, as it must, Appellant's brief spends 52 pages on the heart of the matter, App. Br. 74, that "No evidence supports the first prong of Chapter 11" and "No evidence supports the second prong, as Defendants concede." App. Br. 23-74 (Arguments II and III). Appellant wants the vexatious litigant designation reversed or vacated. Thus, Appellant's brief's Prayer seeks the same relief granted in *Walp*:

CONCLUSION & PRAYER

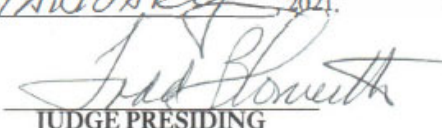
The Court should reverse or vacate entirely the trial court's order declaring Serafine a vexatious litigant and requiring security, Tab 16, and its pre-filing order, Tab 15. *Walp v. Williams*, 330 S.W.3d 404, 408 (Tex. App.—Fort Worth 2010) (where the "trial court's order requiring Walp to post security was based on the trial court's finding that Walp was a vexatious litigant," [and] "the trial court abused its discretion by finding Walp a vexatious litigant, the trial court also abused its discretion by ordering Walp to post the security....")

App. Br. 74.

C. Defense counsel have unclean hands.

Defense counsel alone drafted the final orders declaring Serafine a vexatious litigant and requiring her to pay security. Tabs 15, 16 at SR:1413-1415. No one disputes that she did not pay. All Appellees now claim that the orders they themselves drafted cannot be appealed because of what the orders say. The bottoms of both orders show approval only by defense counsel, not plaintiff's counsel. The signatures are the same on both orders. Here is one of them:

SIGNED on this the 8th day of January, 2021.


JUDGE PRESIDING

Order agreed to in form by:

<u>/s/ Courtney Corbello</u> Courtney Corbello Attorney for Defendant Justices	<u>/s/ Anthony J. Nelson</u> Anthony J. Nelson Attorney for Judge Crump
--	---

Tab 16, SR:1415.

Section 11.056 provides that “[t]he court **shall** dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order.” §11.056 (emphasis added). Dismissal is

mandatory.

But Appellees' self-drafted order defies the statute and states instead:

“Failure to timely furnish security *may* result in dismissal of this suit.” SR:1415 (emphasis added). This was clearly intentional and intended to deceive. It did not need to be said because the statute already says so. Or Appellees could simply have drafted the order to refer to the statute. Appellees' counsel (and the judge)⁷ were well familiar with the statute; they knew or should have known the order was contrary to the statute.

Any Defendant-appellee could have sought dismissal of the entire Section 1983 case against all of them—plus a judgment—but none did so.

Nothing requires Serafine to seek a judgment against herself.

Appellant's brief sets out that these Jurists have engaged in bad faith delay for nearly four years—since filing of this same case in federal court in December, 2017. In order to thwart discovery, avoid the merits of the Section 1983 case against them, and use delay to sabotage the need for prospective relief in *Blunt*, see, e.g., App. Br. 1, 5, 12, 18, Defendant-appellees removed this case to a federal court in which they themselves had just won lack of jurisdiction, App. Br. 6-7, then

⁷ Case law searches establish at least one other Chapter 11 case was decided by this judge.

filed purported vexatiousness motions to leverage the stay, and withheld setting them for hearing for an entire year. App. Br. 8. They should not now be permitted another bad faith delay tactic.

VIII. Appellant's venue change and TCPA issues are properly before the Court and should be decided in Serafine's favor.

Judge Crump's brief at pages 9-10 disputes Appellant's position that the Court should remand to the trial court to determine Appellant's venue change motion and TCPA motion. Her principle claim is that the issue is inadequately briefed, but in reality at note 9 she concedes that the TCPA question was fully briefed in this Court and in the Supreme Court on mandamus. The trial court unaccountably refused its mandatory obligations under CPRC Chapter 27 to hold the hearing. Granting mandamus, under case law in sister courts that have considered it, is the solution for that error. As Appellant's mandamus brief set out, there is obviously a conflict between CPRC Chapters 11 and 27.

Second, Serafine's remaining TCPA and venue change issues are subsumed within the appeal. They are not appealed as though they are appealed independently, but presented as issues that bear directly on the trial court's abuse of discretion in designating Serafine a vexatious litigant. They still need resolution as part of adjudicating this main issue. The trial court rejected a solution that

would have been proper.⁸ We note that there is little or no authority on the question.

IX. This Court cannot remediate what Judge Crump failed to do.

Texas follows the principle of “party presentation.” To maintain neutrality, courts adjudicate the issues only as the parties present them, and nothing more. The Dallas Court of Appeals has most recently set this forth. *Hames Horton v. Stovall*, No. 05-16-00744-CV (Tex. App.—Dallas Dec. 23, 2020). *Hames* emphasized the necessity of due process and impartial, disinterested tribunals. It noted that “[w]e understand when we carry out our duties we must not identify issues and arguments not raised by an appellant.”

The United States Supreme Court explained in *Greenlaw* that the principle of party presentation embodies the appropriate judicial neutrality: [] That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present.

Hames Horton v. Stovall, No. 05-16-00744-CV (Tex. App.—Dallas Dec. 23, 2020)

⁸ As the record and Appellant’s brief make clear, Serafine’s side proposed the correct solution to the conflict between the TCPA and Chapter 11: The venue change and TCPA motions were set for hearing at the same agreed-upon full day of hearings as defendants’ Chapter 11 motions. App. Br. 19-20. This would have solved the problem fairly, but the trial court rejected it out of hand.

(citations omitted).

A dissenting opinion in a Houston case expressed this with a frequently-used phrase: “[Courts] do not, or should not, sally forth each day looking for wrongs to right.” *Ward v. Lamar University*, 484 S.W.3d 440, 457 n. 13 (Tex. App.—Houston [1st Dist.] 2016) (Busby, J., dissenting) (cleaned up).

The Court should not compensate for Appellees’ failings.

CONCLUSION & PRAYER

Appellant seeks the relief requested in the Prayer of her opening brief.

Respectfully submitted,

/s/ John W. Vinson

John W. Vinson
State Bar No. 20590010
Counsel of Record
John W. Vinson, PLLC
PO Box 301678
Austin, Texas 78703
Tel: (512) 926-7380
Email: johnvinsonatty@yahoo.com

/s/ Mary Lou Serafine

Mary Louise Serafine
State Bar No. 24048301
Mary Louise Serafine,
Attorney & Counselor at Law
P.O. Box 4342
Austin, Texas 78765
Tel: 512-220-5452
Email: serafine@mlserafine.com

Attorneys for Plaintiff

CERTIFICATE REGARDING COMPLIANCE WITH RULE 9.4(e)

With reference to Tex. R. App. P. 9.4(e)(i)(2)(B), this brief was produced using Word Perfect software and contains 7,259 words, as determined by the software's word-count function, excluding the sections of the document listed in Texas Rule of Appellate Procedure 9.4(e)(i)(1).

This brief complies with the typeface requirements of Tex. R. App. P. 9.4(e) because it has been prepared in a proportionally spaced typeface using Word Perfect software in Times New Roman 14 point font in the main text and no smaller than Times New Roman 12 point font in footnotes.

/s/ Mary Lou Serafine
Mary Louise Serafine
State Bar No. 24048301

CERTIFICATE OF SERVICE

My signature below certifies that on the 14th day of September, 2021, I served the foregoing document on the parties listed below through the Court's electronic filing system.

Anthony J. Nelson, Esq., tony.nelson@traviscountytexas.gov
Patrick T. Pope, Esq., patrick.pope@traviscountytexas.gov
Office of Delia Garza, County Attorney, Travis County
P. O. Box 1748, Austin, Texas 78767
(512) 854-9513/Fax (512) 854-4808
Attorneys for Appellee the Hon. Karin Crump

Courtney Corbello, Esq., courtney.corbello@oag.texas.gov
Law Enforcement Defense Division, Office of the Attorney General
P.O. Box 12548, Capitol Station, Austin, Texas 78711
(512) 463-2080 / Fax (512) 370-9374
*Attorney for Appellees the Hon. Melissa Goodwin,
the Hon. Bob Pemberton, and the Hon. David Puryear*

/s/ Mary Lou Serafine
Mary Louise Serafine
State Bar No. 24048301

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Mary Serafine on behalf of Mary Serafine
Bar No. 24048301
serafine@mlserafine.com
Envelope ID: 57251252
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Courtney Corbello	24097533	courtney.corbello@oag.texas.gov	9/14/2021 11:12:05 PM	SENT
Anthony J. Nelson	14885800	tony.nelson@traviscountytexas.gov	9/14/2021 11:12:05 PM	SENT
John Willis Vinson	20590010	johnvinsonatty@yahoo.com	9/14/2021 11:12:05 PM	SENT
Patrick Pope	24079151	patrick.pope@traviscountytexas.gov	9/14/2021 11:12:05 PM	SENT
Mary Louise Serafine		serafine@mlserafine.com	9/14/2021 11:12:05 PM	SENT